Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1233

SUPER ATHLETICS CORPORATION,
S. DAVID BRODSKY and DONALD E. PINCHOCK,
Petitioners,

v.

UNIVERSAL ATHLETIC SALES CO.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Counterstatement of the Case	3
Reasons for Denying the Writ	5
The Petition Fails To Establish Any Reason For This Court To Exercise Its Sound Discretion Under Rule 19	5
Super Athletics Has Misrepresented The Proceedings Below In A Desperate Attempt To Invoke Sakraida v. Ag Pro, Inc.	6
Conclusion	9

TABLE OF CITATIONS

CASES

Anderson's—Black Rock v. Pavement Co., 396 U.S. 57 (1970)	6
A & P Tea Co. v. Supermarket Corp., 340 U.S. 147 (1950)	6
Graham v. John Deere Co., 383 U.S. 1 (1966)	7
Sakraida v. Ag Pro, Inc., 425 U.S. 273 (1976)	5, 6
Woodstream Corporation v. Herter's, Inc., 446 F.2d 1143 (8th Cir. 1971)	5

STATUTES

35 U.S.C. §282	4

OTHER AUTHORITIES CITED

Supreme Court Rule 19	5

TABLE OF CONTENTS OF APPENDIX

Court of Appeals' "Order Amending Slip Opinion"	1b
District Court's "Memorandum and Order Re: Plaintiff's Motion To Alter and Amend Judgment"	3b
Court of Appeals' "Amended Judgment"	6b
Plaintiff's Trial Exhibit (PTX) 108	9b
DX-8	10b
DX-3	11b

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UNIVERSAL ATHLETIC SALES CO.,
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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully prays that the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case be denied.

OPINIONS BELOW

The contents of petitioners' Appendix are incomplete with respect to the opinions below. The opinion of the Court of Appeals entered November 19, 1976 was amended on December 30, 1976. The amendment does not appear in petitioners' Appendix but is included in the Appendix to this brief[1] (R.A. 1b). The opinion of the Court of Appeals as amended is officially reported at 546 F.2d 530.

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1. Because of the need for an Appendix to this brief, we shall distinguish the Appendices by referring to petitioners' Appendix as "P.A. ....." and to respondent's Appendix as "R.A. .....".

Likewise the opinion of the district court was amended by a memorandum and order entered October 29, 1975. These materials do not appear in petitioners' Appendix but are included in the Appendix hereto (R.A. 3b).

JURISDICTION

Petitioners' statement of jurisdiction is correct except that it fails to mention that the judgment of the Court of Appeals was amended on January 12, 1977 to award respondent its costs on appeal. The amended judgment appears in the Appendix hereto (R.A. 6b).

COUNTERSTATEMENT OF THE CASE

Petitioners[2] have so distorted and misrepresented the proceedings of this case in the lower courts as to make the preparation of any counterstatement, at best, challenging. Beginning with the statement of the "Question Presented", which wrongly characterizes the Zinkin patent in suit as "only" uniting "old elements with no change in their respective functions", and proceeding through to the inclusion in the Appendix of exhibits that were *not* in the record below[3], the petition is laced

2. Throughout this brief, petitioners Super Athletics Corporation, S. David Brodsky and Donald E. Pinchock are referred to collectively as "Super Athletics."

3. For example, Super Athletics has altered trial exhibits included in the Appendix by adding its own descriptive material which was neither offered nor received in evidence. PTX-108, DX-8 and DX-3 are reproduced in the Appendix hereto in unaltered form (R.A. 9b-12b).

with inaccurate, irrelevant and totally unsupported material. For the sake of brevity, but consistent with providing this Court with an accurate version of the proceedings, respondent, Universal Athletic Sales Co., will expose only the most glaring of these misleading matters.

The Court of Appeals aptly describes the patented subject matter and the events leading up to the Zinkin invention. The Court quite correctly channels its consideration of the invention in terms of the patent claims[4] (P.A. 3-4). We need not, therefore, repeat here the detailed technological aspects of the case that are so well handled by the Court of Appeals. This leaves us to treat the true basis of the decision of the Court of Appeals—evidence.

The Third Circuit first addressed the question of whether the opinion testimony of Super Athletics' expert witness (Firman Lyle) was entitled to the controlling weight given that testimony by the district court in holding the Zinkin patent claims invalid. This initial question was viewed by the appellate court from two vantage points: (i) that Lyle's testimony was suspect because he admittedly lacked the necessary technical qualifications in the pertinent art—the design of body-exercising apparatus (P.A. 6-8); and (ii) that Lyle's testimony should be carefully scrutinized in light of his position as a lawyer employed in the firm of Super Athletics' trial counsel (P.A. 8-12). The Court of Appeals concluded that, although Lyle's testimony was

4. Super Athletics, for some unexplained and indeed unorthodox reason, prefers to assess the patented subject matter from the viewpoint of the infringing machine (see Pet. 3 and reference therein to PTX-108).

admissible, the district court should not have accorded controlling weight to the uninformed opinions of an advocate in holding the Zinkin claims invalid.

Quite logically, the next step taken by the Court of Appeals was an examination of the entire record made by Super Athletics in its defense against the Zinkin patent (P.A. 12-19) to determine whether, in view of the reduced weight properly attributable to Lyle's testimony, Super Athletics had met its burden to overcome the presumption of validity accorded the patent claims by Section 282 of the Patent Act (35 U.S.C. §282). The Court of Appeals concluded that Super Athletics failed to sustain that burden (P.A. 20). Accordingly, the district court's order adjudging the Zinkin patent claims invalid was vacated, and the cause was remanded for further proceedings in the trial court.

REASONS FOR DENYING THE WRIT

The Petition Fails To Establish Any Reason For This Court To Exercise Its Sound Discretion Under Rule 19

Rule 19 of this Court sets forth guidelines for the granting of a writ of certiorari. Part 1(b) of that rule applies to a decision of a Court of Appeals; none of the reasons contained in that part are evident in Super Athletics' petition.

For example, no conflict between courts of appeals is asserted[5] and no important, unsettled question of federal law is urged. The petition advances no conflict with respect to an important question of state law; quite clearly the Court of Appeals was dealing with a routine evidence question. And no extraordinary departure from the accepted course of judicial proceedings is attributed to the Court of Appeals' decision.

The only colorable reason given by Super Athletics for the writ requested is an alleged (and completely unsupported) conflict between the decision of the Third Circuit and this Court's decision in *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273 (1976)[6]. The next section of this topic will demonstrate how Super Athletics tortured the findings of the courts below in an attempt to conjure up an alleged conflict with *Sakraida*. This Court

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5. See *Woodstream Corporation v. Herter's, Inc.*, 446 F.2d 1143, 1157-58 (8th Cir. 1971) for a decision on the evidentiary question raised in the petition that closely parallels the decision of the Third Circuit herein.

6. There is absolutely no reason given in the petition for this Court to review the "Secondary Question Presented". It appears that a consideration of that question would require this Court to review the entire trial record; the Court of Appeals ably conducted that review.

need not reach that section, however, because the Court of Appeals' opinion itself makes clear that the Court considered *Sakraida* (P.A. 14) in its proper context for the facts of this case, and particularly in light of the evidentiary questions that the Court found to be dispositive of the appeal.

Super Athletics Has Misrepresented The Proceedings Below In A Desperate Attempt To Invoke Sakraida v. Ag Pro, Inc.

Super Athletics' argument on patent validity proceeds from the erroneous and completely unfounded premise that the invention claimed in the Zinkin patent *"only** unites *old* elements with *no change* in their respective functions" (Pet. 2, 11). Super Athletics cites no finding of either the Court of Appeals or the district court in support of any aspect of that premise because neither court made such findings[7]. Because the application of *Sakraida* (and for that matter, *A & P Tea Co. v. Supermarket Corp.*[8] and *Anderson's—Black Rock v. Pavement Co.*[9]) depends upon the claimed invention being a "combination of old elements", the absence of that crucial finding by the lower courts in this case causes Super Athletics' argument to fall of its own weight.

---

*Emphasis ours throughout unless otherwise noted.

7. This present situation may be contrasted with *Sakraida* in which this Court observed (425 U. S. at 281):

> "The Court of Appeals recognized that the patent combined old elements . . . ."

8. 340 U.S. 147 (1950).

9. 396 U.S. 57 (1970).

Among the reasons why neither Super Athletics nor the courts below could support a finding of "only uniting old elements" was Super Athletics' utter failure to establish the "scope and content of the prior art" as required by this Court's decision in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). As the Court of Appeals stated (P.A. 14):

> "While the district court, in the present case, specifically considered the three mandatory tests [of *Graham*], it erred in its evaluations under these requirements, *largely because of the dearth of evidence submitted by the defendants.*"

In the petition, Super Athletics attempts to compensate for this "dearth of evidence" submitted by it at the trial in two ways: (i) misrepresenting the nature of the testimony given by Super Athletics' expert witness, Lewis Riecke, and the consideration given that testimony by the Court of Appeals; and (ii) adding its own "teachings" to the trial exhibits included in the Appendix. Both of these techniques constitute unwarranted excursions outside of the record and should not be countenanced.

The petition states (p. 7):

> *"No consideration at all was given by the Court of Appeals to the testimony of Lewis Riecke."* [Emphasis in original]

This statement is both wrong in fact and irrelevant. As to whether the Court of Appeals gave any consideration "at all" to Riecke's testimony, we accept that Court's statement (P.A. 12):

> Because the district court gave undue weight to testimony of Mr. Lyle, *we must consider whether*

the remaining evidence in the record is sufficient to sustain the ruling that the patent claims are invalid."

The fact is that no testimony on the prior art was adduced from Riecke by Super Athletics; his direct testimony was confined to technical matters relating to the arc described by the exerciser's hands in performing a chest press and to the design of his own weight training machine[10]; and on cross-examination, Riecke in fact acknowledged the significant contribution to the exercise art made by the Zinkin invention (R. 535a).

The doctored trial exhibits in the Appendix to the petition should be ignored. Neither the trial court nor the appellate court had exhibits in such form before it.

---

10. The Riecke machine was constructed after the Zinkin invention and, therefore, was properly disregarded by the district court (P.A. 33).

CONCLUSION

For the foregoing reasons, this Court should deny a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1023

UNIVERSAL ATHLETIC SALES CO., a corporation,
Appellant

v.

AMERICAN GYM, RECREATIONAL & ATHLETIC EQUIPMENT CORPORATION, INC., et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 71-166

Argued September 9, 1976
Before: ADAMS, ROSENN and GARTH, Circuit Judges.

Order Amending Slip Opinion

It is hereby ORDERED that the following corrections be made in the slip opinion filed on November 19, 1976:

Page 2, footnote 2:

Change the words "the amendment is, as of this time, unreported. For the amended opinion, see Appendix at 61-63." to read "the amended judgment is set forth at 97 F. Supp. at 1074."

Page 6, footnote 11:

Change the entire footnote, as set forth in the slip opinion, to read:

This Court has jurisdiction pursuant to 28 U.S.C. §1292(a)(1), for the district court below, in effect, denied an injunction against further infringement. It may be that we also possess jurisdiction pursuant to 28 U.S.C. §1292(a)(4), which authorizes an appeal from a district court judgment in a patent infringement action that is final except for an accounting. *But see* 9 J. MOORE'S FEDERAL PRACTICE ¶ 110.19 [4] (1975). Because we believe that these provisions constitute sufficient grounds for jurisdiction, we did not certify this case for appeal under 28 U.S.C. §1292(b), as desired by the district court. *See* 397 F. Supp. at 1074. Absent these sources of jurisdiction, however, we would have issued the requisite §1292(b) certificate because this case raises substantial issues, the resolution of which should materially enhance resolution of this protracted litigation.

Page 9, footnote 19:

Change the entire first full paragraph of footnote 19, as set forth in the slip opinion, to read:

The Code of Professional Responsibility was promulgated by the American Bar Association in 1969, and it became effective in 1970. The Pennsylvania Supreme Court explicitly adopted the Code in 1974 for members of the Pennsylvania bar, among whose ranks are Mr. Lyle and defendants' attorneys. *See* Pennsylvania Rules of Court 1975 at 175-241. However, it is apparent that the Code was applicable in Pennsylvania prior to 1974. *See In re* Estate of Lohm, 440 Pa. 268, 278-79, 269 A.2d 451, 457 (1970); Rules of Court, 331 Pa. xxxvi (1938). By contrast, neither the District Court for the Western District of Pennsylvania, which tried the present case, nor this Court has expressly adopted the Code.

By THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: December 30, 1976

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNIVERSAL ATHLETIC SALES CO.
v.
AMERICAN GYM, RECREATIONAL AND ATHLETIC EQUIPMENT CORPORATION, et al.

Civil Action No. 71-166

Dated: October 29, 1975.

Memorandum and Order
Re: Plaintiff's Motion to Alter and Amend Judgment

Plaintiff has filed a motion under Rule 59 to alter or amend the judgment entered June 23, 1975, in this case with respect to Zinkin Patent No. 2,932,509. The motion has been argued and briefed and the court will in this memorandum dispose of the points raised.

As to plaintiff's claim that the court's judgment is overly broad in declaring Patent No. 2,932,509 invalid *in toto,* while in fact only Claims No. 3 and 4 of the patent have actually been litigated, the court finds that the plaintiff's position is well t[illegible]en. Section 181 of Title 35 U.S.C., *Patents,* provides:

"Presumption of Validity—Defenses.

A patent shall be presumed valid. Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of the other claims; dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting it."

This case has proceeded on the basis that only Claims No. 3 and 4 were disputed. As the other six claims of the patent have not been contested in this action, the presumption that they are valid would certainly preclude a contrary finding by the court in the absence of any evidence. Although these claims are of record (Plaintiff's Ex. 79 shows the entire patent), they have not been the subject of expert testimony or argument of counsel. These six claims do appear to be of a similar nature to claims 3 and 4, and it may be that they should logically stand or fall with those claims. However, despite defendant's argument that the public would best be protected by declaring the entire patent invalid, the court knows of no basis for so doing. In any event, a judgment invalidating these six claims, if relied upon by some other party for collateral estoppel, might fail to withstand a Blonder-Tongue[1] attack as being entered without a full and fair opportunity to litigate.

A defendant is, of course, protected from repeated litigation—first under one claim of a patent and then under another—by the principles of laches and of collateral estoppel. Likewise, an alleged infringer might counterclaim for a declaratory judgment, bringing into direct issue those other claims of invention the defendant fears might subsequently be asserted against it. The judgment will be amended accordingly.

1. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 US 313, 28 L Ed 2d 788, 91 S Ct 1434 (1971).

The plaintiff's remaining exceptions will be denied. Many of these raise purely semantical differences. For example, plaintiff excepts to the entry of judgment for the defendants "with respect to the issues of patent validity and infringement". It is true that the court found, as plaintiff asserts, that infringement would have occurred *if* the patent were valid, but having held the patent invalid, the court must necessarily enter judgment for the defendants on that claim of relief. Plaintiff's formulation of judgment for the defendants "with respect to the issue of patent validity and the *claim* of infringement" is equally ambiguous; it might suggest to the reader that plaintiff's claim was not sustained because no infringement was found, rather than because the patent is invalid. In either case, one must look to the opinion to find the basis for *the judgment*.

The court also finds it inappropriate to make the further findings of fact requested by plaintiff. While some of these matters are not seriously disputed, such as the witness Firman Lyle's association with defense counsel's firm, the court did not in its opinion state many matters that pertain to the credibility of witnesses or the details of their testimony all of which were considered in arriving at the conclusions of the court. The court believes the opinion amply states the reasons for holding.

The motion to alter and amend judgment will therefore be denied except as indicated above. An appropriate order will be entered.

WILLIAM W. KNOX
United States District Judge

CC:
Counsel of record.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNIVERSAL ATHLETIC SALES CO.
v.
AMERICAN GYM, RECREATIONAL AND ATHLETIC EQUIPMENT CORPORATION, et al.

Civil Action No. 71-166

Amended Judgment Order

AND NOW, to wit, October 29, 1975, the judgment order entered June 23, 1975, is hereby amended as follows:

IT IS ORDERED that Claim Nos. 3 and 4 of Patent No. 2,932,509 issued to Harold Zinkin on April 12, 1960, are hereby adjudged and declared to be invalid;

IT IS FURTHER ORDERED that as to the remaining claims of that patent the judgment entered June 23, 1975, is vacated, no determination being made as to the validity of those claims;

IT IS FURTHER ORDERED that plaintiff's motion to alter and amend judgment is otherwise denied and the judgment entered in this case on June 23, 1975, is reaffirmed except as expressly amended and altered in this order.

WILLIAM W. KNOX
United States District Judge

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Amended Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1023

UNIVERSAL ATHLETIC SALES CO., a corporation,
Appellant

v.

AMERICAN GYM, RECREATIONAL & ATHLETIC EQUIPMENT CORPORATION, INC., GRAYSON INDUSTRIES CORP., AMERICAN SUPER GYM CORP. and SUPER ATHLETICS CORPORATION, all corporations; RONALD ARBASEK, an individual; and LARRY SALKELD, DONALD E. PINCOCK and S. DAVID BRODSKY, individuals, dba SUPER ATHLETICS CORPORATION

(D.C. Civil Action No. 71-166)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

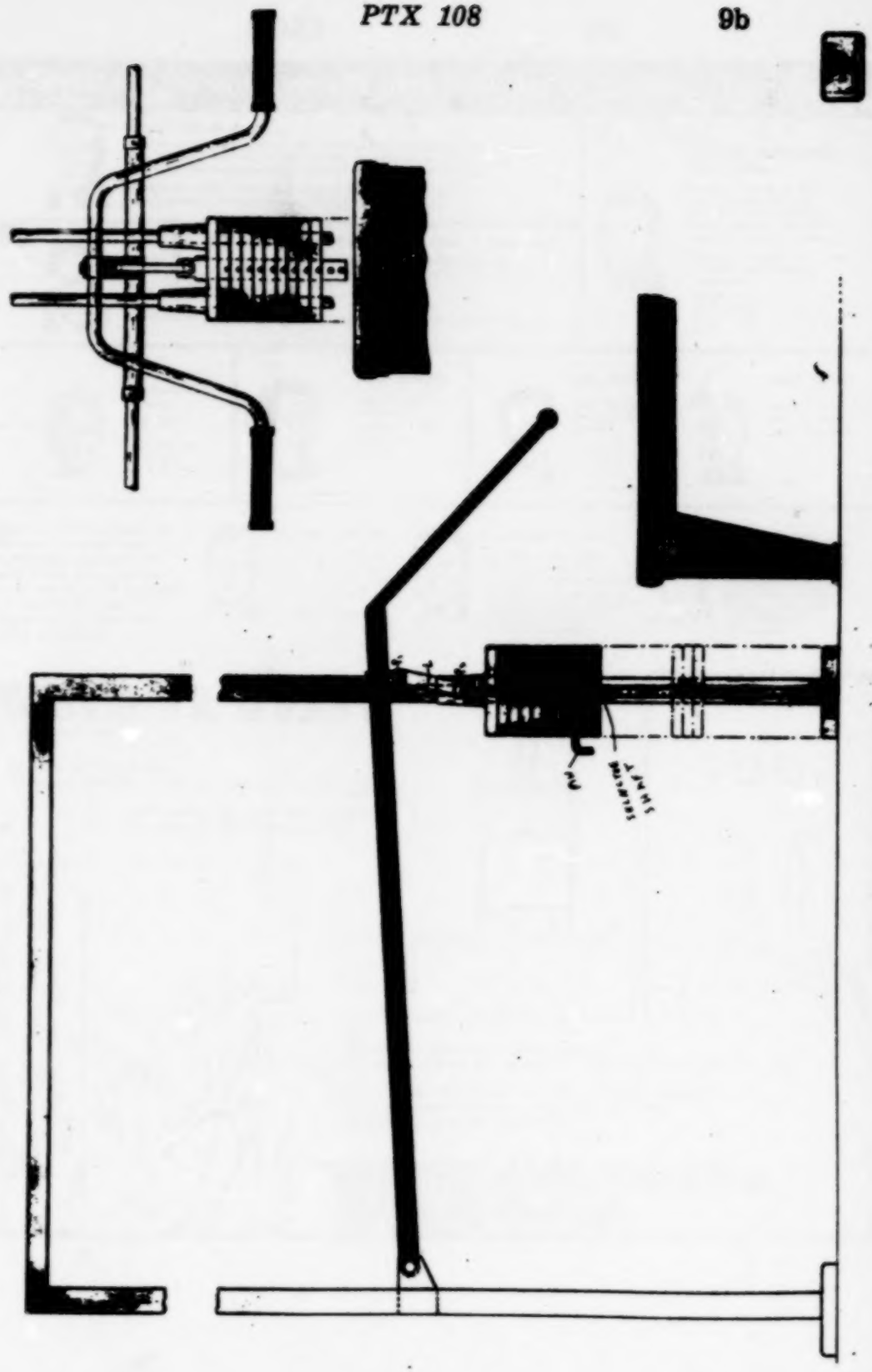
Present: Adams, Rosenn and Garth, *Circuit Judges*

Amended Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 29, 1975, be, and the same is hereby vacated and the cause remanded for proceedings consistent with the opinion of this Court. Costs taxed in favor of appellant.

Attest:
THOMAS F. QUINN
Clerk



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HAROLD ZINKIN Executive Vice President and General Supervisor

Physical Therapist—Torrance Medical Center and West Los Angeles Physical Service. Rehabilitation Specialist—U. S. Navy Reserves. Inventor of Patents No. 2,932,509 and No. 3,116,067.
A.A.U. National Weight Lifting Champion—1945.

Coordinates products research and development with engineering and production.

KENNETH GUSTAFSON
Chief Engineer

B.S.M.E., Calif. State Polytechnic College, San Luis Obispo, Calif. Mechanical Design Engineer, with vast experience in human factors.

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2. Trouble-free function

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JACK BROWN

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Director of distributorship divisions.

BILL CURRY

Plant Manager and Quality Control.

DALE FAUST

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RICHARD BERGER

Ph.D. Univ. of Illinois. Director of Physiology Research, Temple Univ. National Collegiate Weight Lifting Champion—1958.

DUKE LLEWELLYN

B.A. Physical Education, U.S.C. Director of Athletics Los Angeles Athletic Club and Allied Clubs. Special Advisor to the President's Council on Physical Fitness. Trainer of Olympic Champions.

GENE O'CONNELL

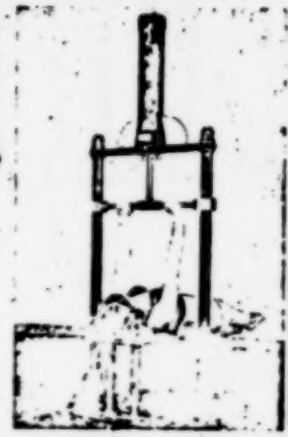
M.S. Physical Education, U.C.L.A. Coordinator of Body Conditioning Program at U.C.L.A. and Calif. State College at Los Angeles.

REMEMBER WHEN?

by Universal staff

While loose weights were falling off barbells . . . This first was conceived in 1949.

Multi purpose leg, chest and shoulder machine hydraulically incremented.



While many were only building racks to support barbells and benches . . . This first was conceived in 1955.

Four Man Machine. Weights in 5 lb. automatic increments. Conditions upper and lower body. First advanced automatic quad pulley machine.

UNIVERSAL'S ACCELERATED EVOLUTION PRESENTS THE GLADIATOR

BEST COPY AVAILABLE

C.A. Simmons' Listing Machine.

117339 PATENTED JUL 25 1871

Fig 1

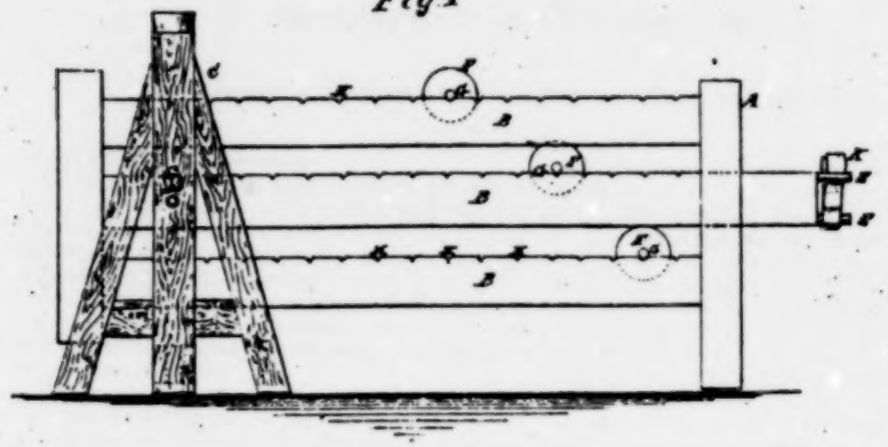
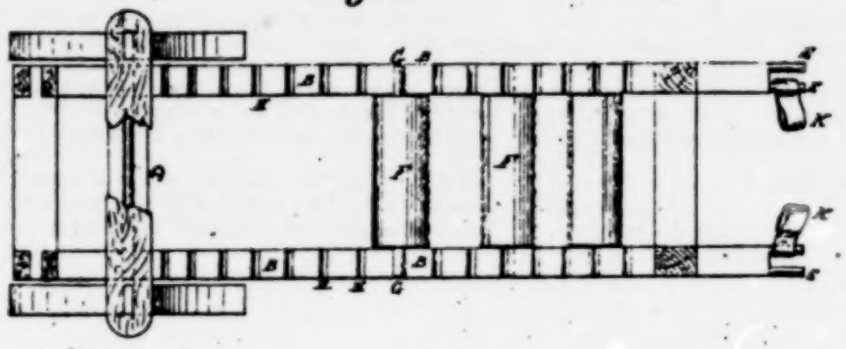


Fig. 2



Witnesses:
A.W. Almquist
Wm H. G. Smith.

Inventor:
C.A. Simmons.
per Munn & Co
Attorneys.

117,339

UNITED STATES PATENT OFFICE.

CICERO A. SIMMONS, OF WALDO, FLORIDA.

IMPROVEMENT IN LIFTING-MACHINES.

Specification forming part of Letters Patent No. 117,339, dated July 25, 1871.

To all whom it may concern:

Be it known that I, CICERO A. SIMMONS, of Waldo, in the county of Alachua and State of Florida, have invented a new and Improved Lifting-Machine; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawing forming part of this specification.

This invention relates to a new and improved machine for lifting purposes, for testing the power of persons to lift heavy weights and developing the muscular system; and it consists in a frame of two or more pairs of parallel bars pivoted near one end, and carrying heavy cylinders which may be easily rolled along the tops of the bars from one to another of notches arranged along the upper edges of the bars at equal distances apart, and having the gravity indicated in pounds by figures at each notch, which the weights resting therein will represent when the frame is lifted at the fore end, all as hereinafter more fully described.

Figure 1 is a side elevation of my improved machine, and Fig. 2 is a plan view of the same.

Similar letters of reference indicate corresponding parts.

A represents the frame of three (more or less) pairs of parallel bars, B, pivoted to a stand, C, at D, and provided with lifting-handles E at the end of the frame at the greatest distance from the pivot. F represents the cylinders used to weight the frame; they have a journal, G, at each end to rest in the small notches H arranged in the upper edges of the bars at equal distances apart from the pivot toward the handles, and marked to indicate the weight of the cylinders or the resistance they offer, when in them, to the raising of the frame by the handles. I make two sets of handles at different heights for suiting the machine to short or tall people, and I provide a pair of lifting-straps, K, with loops in each end, one for the hands of the operator and the other for the handles.

It will be seen that this machine may be graduated very readily to the capacity of any person.

Having thus described my invention, I claim as new and desire to secure by Letters Patent—

The lifting-frame A, stand C, and cylinder F, combined and arranged substantually as specified.

CICERO A. SIMMONS.

Witnesses:
JAMES CHACE,
GEO. W. SPARKMAN.